Supreme Court of the United States.

ABSALOM BACKUS, JR., and A. BACKUS, JR., & SONS (a corporation),

Plaintiffs in Error,

vs.

THE FORT STREET UNION DEPOT COMPANY.

Error to Supreme Court of Michigan, October Term, 1897—No. 55.

PETITION FOR RE-HEARING.

The petition of Absalom Backus, Jr., and A. Backus Jr. & Sons, plaintiffs in error, respectfully represents and submits to the Court the following grounds for a reargument and rehearing of this cause:

I.

IN THE CONSIDERATION AND DISPOSITION OF ASSIGNMENT OF ERROR NO. 8, *THE LEARNED COURT, AS SHOWN BY THE OPINION, HAS OVERLOOKED: (a) THE MOST SUBSTANTIAL ERROR IN THE PROCEEDINGS BELOW IN RESPECT OF COMPENSATION; (b) HAS OVERLOOKED THE FACT THAT REQUESTS TO CHARGE WERE PREFERRED AT THE NISI PRIUS HEARING; (c) HAS OVERLOOKED THE UNIFORM HOLDINGS IN THE STATE OF MICHIGAN IN SUCH CASES THAT REQUESTS TO CHARGE WERE NOT REQUIRED; AND (d) HAS MISAPPREHENDED THE RECORD AS TO VALUATIONS OF THE PROPERTY IN QUESTION.

On the question of compensation below, we rested our main contention upon the fact that the plant of the plaintiffs in error

*Point IV. of the brief, pp. 15 bottom, 58 top.

consisted of three parts: (1) The mill itself, covering about $1\frac{3}{4}$ acres of land; (2) The receiving and shipping yard, consisting of 7 acres of land; (3) A block of ground in the City of Detroit for clean storage and sale.

See citations from brief, page 3, and record citations, id. 58.

The valuation at $150,000, referred to in the opinion, covered only the $1\frac{3}{4}$ acres of the mill site and did not embrace, as disclosed by the record, the value of the other parts of the plant. We insisted and still insist that the rule of just compensation required payment for injury to or diminution of value in respect of all the parts of the plant left remaining, and not merely payment for damages to the mill and mill site.

It seems to us clear that if the taking of the front of the mill site prevented the carrying on of that part of the business there, then as the three parts were an entirety as a plant, adjusted relatively to each other and to the situation, as they were when interfered with, then there could be no rule of just compensation which did not take into consideration the injury to the other parts of the plant when thus thrown out of adjustment.

There can be no doubt that the rule in Michigan was and is, that damages must be given for the parts of the plant remaining and which were not even touched by the railroad.

It is the universal holding. For luminous statements of this rule and of the reasoning in its favor we refer to the several opinions delivered in the leading English case on the subject, Cowper Essex vs. Local Board, 14 App. Cases, 153. There the lands immediately affected were not in contact with the other parts. As stated by Lord Macnaghten, at page 175: "It is "enough if both parcels of land are held by one and the same "owner, and if the unity of ownership conduces to the advant-"age or protection of the property as one holding."

The opinions of Lord Bramwell, at page 169, and of Lord Watson, at page 167, state the justice of the rule with clearness.

Now on this question, fully argued and carefully presented —an elementary rule of just compensation—we were entitled

without any request to charge, if any charge was given on the subject of damages, to have included in the consideration the other parts of the plant. But after the argument, and even in the general charge of the court below, this elementary rule of damages was *excluded* in these words:

"The amount to be allowed to Absalom Backus, Jr., as owner "in fee of the land described, and the amount to be allowed to "A. Backus, Jr., & Sons, as tenants in possession of such lands."

Now the lands "described" was that set out in the petition, as shown by the context* of the charge, and was the land only upon which the mill stood—the 1¾ acres.

This, we submit, was a manifest error, and we at once pointed it out in the following words:

"We except to that part of the charge of the Court wherein "he says that the damages are to be confined to the damage to "the real estate described, and the improvements upon it; "whereas, in our view, the damages are to the entire plant, in- "cluding the injury to the business from the impairment of the "mill as affecting its adjuncts, the lumber yard and the store- "house."—Record, p. 1784, fol. 2983.

This question is further pursued in our brief at page 59, et seq.

As shown in our original brief, by the express holding of the Supreme Court, under the railroad statute, of which the Union Depot Act is a transcript in haec verba, requests to charge or other similar forms of judicial procedure are not to be followed in respect of the tribunal of the Constitution, whether made up as commissioners or jury.

It is said in the learned opinion of this Court that that class of cases apply only to the general railroad act, and not to the Union Depot act. Aside from the rule that the adoption of

*The land "described in the petition" and thus pointed out, carefully describes the factory alone on the north side of River street (see Record, p. 5). But the 7 acres of yard were below on the south side of River street, and the block for clean storage was above on Fort street, and was was not in contact with River street.

the statute adopts its construction, we pointed out in our brief at page 23, that in respect of the construction of the Union Depot act, as to procedure, the Supreme Court of the State had in terms and by the citation of the leading cases, adopted for the Union Depot act the construction applied to the railroad act. Fort Street Union Depot Co. vs. Jones, 83 Mich., p. 412, which was a case under the Union Depot act.

So far as the practice of requests to charge is concerned, as that practice is uniformly held in the State Supreme Court, there has been no reversal of the holding in this case. All that the Court below had to say on that subject, 103 Mich., 556, is this:

"It is proper here to note that no requests to charge were "presented on behalf of the respondents."—See Record, page 1820, fol. 3044.

Such a statement made in passing can hardly be cited as a judgment of the Court that requests to charge were necessary as against the uniform rulings of the Court theretofore, that the practice was not required. But on the last trial at nisi prius, inasmuch as the Court had shown a disposition to charge the jury, a practice theretofore unheard of, we *did* request a charge upon these essential questions, in terms as follows:

"And I call your honor's attention to this, *so that in the instructions your honor contemplates giving, they may follow, not our construction of the decisions, but the language of the decisions of the Supreme Court*, speaking through such "learned justices as Justice Campbell and Justice "Cooley. * * * * * * Now what "is included within the terms of the constitution as compensa- "tion under the decision of the Supreme Court of this State, and "I shall only refer to a few. *I shall mark the passages, and "ask your honor's attention to them in giving your views of the "law to the jury.*"—Record, p. 1692, fol. 2827-2828, et seq.

Thus were the requests made to follow the marked passages, which passages were marked and handed to the Court, and were

read by counsel, as shown by the Record, and upon the failure to follow the marked passages as read, exception was taken in the following language:

"We except to the refusal of the court to charge as I request-"ed, in the language or in the substance, according to the decis-"ions of the Supreme Court, which I read in full upon the open-"ing of my argument and called attention of the Court to it, "especially to the expression of Campbell, J., in delivering the "opinion of the Court in G. R. & I. Co. vs. Weiden, 70 Mich., "393-395."—Record, p. 1784, fol. 2984.

It is not understood that this Court held in Chicago, Burlington, etc., R. R. vs. Chicago, 166 U. S., 226, that if any damages at all were given by the state tribunal that no complaint could be made of the deprivation of the fundamental right to "just compensation."

It is understood by that judgment that this Court will "in-"quire whether the trial court prescribed any rule of law for the "guidance of the jury that was in absolute disregard of the company's right to just compensation." (Page 246.) This Court did there hold that "many matters may occur in the progress of such "cases that do not necessarily involve, *in any substantial sense*, "the Federal right alleged to have been denied; and in respect "of such matters, that which is done or omitted to be done by "the State court may constitute only error in the administra-"tion of the law under which the proceedings were instituted." (Page 246.)

But here by the rules laid down by the nisi prius court we were deprived of any consideration of the true rule of compensation, not only on the question of breaking up a profitable business, but also as to the injury to the property left.

Non constat we may have received a verdict for $63,000 for certain things, under the ruling of the Court, yet if by improper limitations enforced by the State court we were deprived of compensation for other and greater injuries, then we were as much within the protection of the rule for relief as if we had not received a dollar in damages.

To hold that because a citizen gets any damages, he cannot appeal to the fundamental rule for his protection in respect of other causes for damage, would leave the citizen without any substantial protection in this provision of the constitution.

To receive $63,000 and to lose without relief three timse that amount may well be the difference between protection and ruin.

II.

IN THE CONSIDERATION AND DISPOSITION OF ASSIGNMENT OF ERROR NO. 12* THE LEARNED COURT, AS SHOWN BY THE OPINION, HAS MISUNDERSTOOD AND MISAPPREHENDED THE RECORD IN RESPECT OF THE DENIAL OF A HEARING TO THE PLAINTIFFS IN ERROR BY THE SUPREME COURT OF MICHIGAN.

In the opinion in this case this Court says:

"Under the fifth head counsel present two matters:

" '(1) The denial by the Supreme Court of the State of a hear-
" 'ing on the substantial and essential question, of whether coun-
" 'sel for plaintiffs in error abused their privilege as counsel by
" 'arguing to the jury on the question of necessity that the mar-
" 'gin of the depot grounds that belonged to the Michigan Cen-
" 'tral road could be taken for the elevated structure. * *

"With reference to the first, it is enough to say that the re-
"spondents did not appeal to the Supreme Court, and that
"under section 3468 it would seem that that Court was called
"upon to consider only such objections as had been particularly
"specified. 'Either party may appeal by notice in writing';
" 'such notice shall specify the objections'; 'the Supreme Court
" 'shall pass on such objections only, and all other objections,
" 'if any, shall be deemed to have been waived.' No objection
"to the finding of the jury as to the question of necessity has
"been made by the appellant, and therefore was to be treated

*Point V. of brief, p. 67.

"as waived. Under those circumstances it cannot be said that "the Supreme Court deprived the respondents of any rights by "refusing to hear counsel in respect to the question of necessity, "or connected with its determination."

Opinion, page 11.

The misapprehension of the Court is complete and consists in this: That counsel for plaintiffs in error did not attempt to argue the question of necessity as such, but were in the Supreme Court of the State in response to an appeal against an award, summoned there to answer, and the objections to the award which were specified as the grounds of that appeal, have been overlooked, thus:

"Notice of Appeal—

"The petitioner does hereby specify the following objections "to the proceedings had in the premises, that is to say: (Here "follow objections one to twenty-three, as set forth in the mo- "tion to vacate said verdict and award, dated August 15, 1891.)"

Record, p. 947, fol. 1636.

These grounds are set out at page 849 of Record, and it will be seen that the principal grounds of appeal which we were called upon to answer in the Supreme Court were that "The at- "torney for the respondents, taking advantage of the absence of "the judge, did improperly, erroneously and falsely claim and "pretend to and before said jury that the petitioner, the Fort "Street Union Depot Company, has power, under the statutes "of this State, to condemn right of way for an elevated rail- "road along the margin of the property of the Michigan Central "Railroad Company on the south side of River street, and for "that reason the jury ought to find that there is no public neces- "sity for taking a right of way in, upon and along said River "street for the elevated railroad proposed by the petitioner, and "thereby said attorney did, *by repeated arguments and asser- "tions to and before said jury, convince a number of said jury*

"*that the property of the Michigan Central Railroad Company "could be condemned by the petitioner under existing statutes, "so that when said jurymen came to yield on the question of "necessity, they were so biased and prejudiced against the "petitioner that they insisted upon the most extravagant, exor- "bitant and grossly excessive damages, to the great wrong and "injury of petitioner.*"

Record, p. 849, fol. 1462.

This is stated in various forms and ways, and these and our right to answer them (not to discuss the question of necessity) are discussed at length at p. 71 et seq. of our brief.

The question remains whether we had a right to be heard in reply to these grounds of appeal when summoned into court to reply to them as the principal grounds of appeal, and the substantial grounds of the adverse decision below.

It is clear that we were denied a hearing in the Supreme Court of the State in reply. It must be equally clear that we were entitled to be heard before the court could decide that these grounds of appeal were well taken. But by referring to the decision of the Supreme Court of Michigan in that case, 92 Mich., 33, it will be seen that the decision was adverse to us on all these very grounds of appeal on which we were denied a hearing.

Thus the Court below in that case passes on this series of objections to the verdict adversely to us, commencing as follows:

"The second objection urged by petitioner's counsel is that "'the attorneys for the respondents, taking advantage of the "'absence of the judge, did improperly, erroneously and falsely "'claim and pretend to and before said jury that the said peti- "'tioner has the power, under the statutes of this State, to con- "'demn a right of way for an elevated railroad along the margin "'of the property of the Michigan Central Railroad Company "'on the south side of River street, and for that reason the jury "'ought to find that there is no public necessity for taking a

"'right of way in, upon, and along said River street for the ele-
"'vated railroad proposed by the petitioner; and thereby said
"'attorney did, by repeated arguments and assertions to and be-
"'fore said jury, convince a number of said jury that the prop-
"'erty of the Michigan Central Railroad Company could be con-
"'demned by the petitioner under existing statutes, so that when
"'said jurymen came to yield on the question of necessity they
"'were so biased and prejudiced against the petitioner that they
"'insisted upon the most extravagant, exorbitant and grossly
"'excessive damages.'"

Record, p. 956, fol. 1652.

And then, after grouping a number of other objections of the same nature, proceeds to approve the ruling of the Court below upon them, in the following words:

"It would be difficult to conceive of an argument more effect-
"ive, the certain and inevitable tendency and effect of which
"would be to influence the jury and cause them to award the
"most extravagant and exorbitant damages." * * *
"It is the duty of the Court to interfere where matters foreign
"to the issue are rehearsed before the jury prejudicial to the in-
"terests of a party." * * * "There are many
"pages of the arguments of counsel in the Record showing the
"persistency with which counsel urged upon the jury the **right**
"of the petitioner to take the property of the Michigan Central
"Railroad Company, *and it is too plain for argument that it*
"*must have affected the jury in determining the amount of dam-*
"*ages to be awarded.* The jury ought not to have permitted the
"testimony to be given relating to that subject, or listened to
"arguments thereon."

Record, p. 960-961, fol. 1657-8.

It cannot be true that these plaintiffs in error could be sum-

moned into court to defend the rectitude of the award when attacked on the above grounds and be deprived of a hearing in answer or to sustain the rectitude of the award when so attacked except in plain and direct violation of the constitution of the United States as expounded by this court in Hovey vs. Elliott, 167 U. S., 425-424.

We submit that this Court could not have intended to hold that we were properly denied such a hearing, and that the only reason for the adverse holding is the misapprehension of the Record, plainly shown in the language above quoted from the opinion upon that part of the 5th point in our brief.

III.

On the effect of entering into possession the learned Court, as shown by the opinion (page 6) says:

"The argument is that the property owner has a constitu-
"tional right to have the amount of his compensation finally de-
"termined and paid before yielding possession; that the party
"seeking condemnation (in this case the Depot Company) can-
"not be let into possession until after all question as to the com-
"pensation has been finally settled, and the amount thereof paid;
"that it cannot take advantage of one report or verdict, pay the
"sum fixed by it, obtain possession and still litigate the question
"of amount; that if it does then pay and take possession its right
"to further litigate is ended. But the Supreme Court of the
"State held against this contention, and we must assume there-
"from that it is not warranted by the constitution and statutes
"of the State."

AND IT IS ERRONEOUSLY ASSUMED THAT THE UNIFORM CONSTRUCTION OF THE CONSTITUTION OF THE STATE BY THE SUPREME COURT OF MICHIGAN, POINTED OUT IN OUR BRIEF, THAT FINAL ASCERTAINMENT AND ACTUAL PAYMENT OF COMPENSATION MUST PRECEDE POSSESSION, WAS REVERSED BY THE SUPREME COURT OF THE STATE IN THIS CASE.

The opinion and judgment of the Court below in the 103 Mich., 556, does not refer to the fact that possession had been taken at all, and does not hold or intimate any different construction of the fundamental law in this regard; and in the case in the 92 Mich., 33, the court was dealing with a hypothetical case and not with possession fully and actually taken. It certainly does not hold to a different construction as to the effect of actual possession from that theretofore universally held in the State, because the Record did not disclose any such possession.

See as to the character of the possession as shown by the Record—Brief, p. 35, et seq.

In coming to the consideration of whether a citizen has been denied the "equal protection of the laws," the first matter for consideration is to ascertain what the law in question is. If the state court has passed upon it, that construction is conclusive upon this jurisdiction until reversed.

There has been no reversal of the settled holding of the Supreme Court of the State as to this, that possession cannot be taken, or if taken, legalized, until compensation has been finally ascertained and fully paid; and further that this is so by the constitution of the State. The laws and decisions of other States can have no application or authority.

IV.

THE STATE COURT HAS NOT REVERSED ITS UNIFORM HOLDING THAT BY THE CONSTITUTION OF THE STATE THE PROCEEDINGS FOR CONDEMNATION WERE NOT JUDICIAL, WHETHER THE TRIBUNAL TOOK THE FORM OF A JURY OR OF A BOARD OF COMMISSIONERS.

IN EITHER CASE THE UNIFORM HOLDING WAS AND IS UNDER THE UNION DEPOT ACT, THAT THE PROCEEDINGS SHALL NOT BE INFLUENCED BY ANY JUDGE OR LEGAL EXPERT. THERE IS NO QUESTION RAISED OF A VESTED RIGHT TO ANY PROCEDURE, BUT THE QUESTION RAISED IS TO A FUNDAMENTAL RIGHT UNDER THE CONSTITUTION AS SACRED AS THE RIGHT OF TRIAL BY JURY IN A CRIMINAL CASE.

If a right to procedure is secured by the fundamental law, it is a right which cannot be taken away; and it has been seen that the historic reasons for the adoption of the constitution as thus construed by the Supreme Court of the State are fully discussed and the firm holding reached that the right to be free from the interference of a court is a sacred and fundamental one.

There is no reversal of this construction of the constitution of the State in the 103 Mich., 556.

On the contrary, that decision was this:

"The same course pursued upon this proceeding was also "pursued in the case of Railway Co. vs. Dunlap, 47 Mich., 456, "and the Court refused to set aside the award, even though the "charge of the judge was 'ambiguous and open to criticism'. "Under the rule of that case this award canot be disturbed," etc.

Record, p. 1816, fol. 3040.

It is clear that the judgment in the 103 Mich., 556, affirms the case cited and assumes to rest upon it. It thus affirms the construction of the law of that case; and that is the leading case for our contention quoted and affirmed in repeated judgments,

all of which are cited at page 23 et seq., and 50 et seq., of the Brief.

The construction by that leading case, which was a case under the old railroad act, had also before been adopted by the Supreme Court of the State as the proper construction under the Union Depot act. Union Depot Co. vs. Jones, 83 Mich., p. 415, was a condemnation case under same act as in this case. There the Court cited and adopted the same leading case, 47 Mich., 456, supra, by quoting it as follows:

"*In all such cases the constitution*, as well as the principles of "the common law, makes them (the jury) judges of law and "fact." * * * "Their conclusions are not based "entirely on testimony. They are expected to use their own "judgment and knowledge from a view of the premises, and their "experience as freeholders, quite as much as the testimony of "witnesses to matters of opinion."

And then saying:

"It was there also held that the functions of the judge in such "cases were advisory merely, an that such controversies as this "cannot be disposed of on merely technical notions. These pro-"ceedings may be instituted in probate courts, the judges of "which are frequently not lawyers, and are unfamiliar with the "rules of evidence."

If the construction of the State constitution is for the State Court, and that construction remains unreversed by that Court, that construction is the law for this Court in considering the question of whether the plaintiffs in error have been denied the equal protection of that law.

It is respectfully submitted and urged that there should be a more full consideration of this case by this Court and by a full bench. No one can suffer from delay, as it appears by the Record that the Depot Company is in full possession of the property, and in addition is fully secured on other property for

the judgment, and that the legal rate of interest in the State of Michigan is six per cent.

Absalom Backus Jr.
A. Backus Jr & Sons.
Plaintiffs in Error,
By Dickinson Thurber Stevenson
their Attorneys

Don M Dickinson
Of Counsel.

I hereby certify that in my opinion the foregoing petition for rehearing is well founded in law.

May 3, 1898.

Don M Dickinson
Of Counsel for Plaintiffs in Error.